



THE CITY OF SAN DIEGO MANAGER'S REPORT

DATE ISSUED: October 18, 2000

REPORT: 00-218

ATTENTION: Honorable Mayor and City Council
Docket of October 23, 2000

SUBJECT: San Diego Municipal Code Ordinance Changes related to Massage, Holistic Health Practitioners, and General Sections

SUMMARY

Issue – 1) Should the City Council amend the San Diego Municipal Codes regulating massage and holistic health and the general sections for police regulated businesses and occupations? 2) Should the City Council approve the proposed regulatory fees, in order to recover costs?

Manager's Recommendation - Approve the changes to the San Diego Municipal Code and approve the regulatory fees.

Other Recommendations - None.

Fiscal Impact – Regulatory fees are based on the cost of administration, implementation and enforcement for the industry. The proposed fees are based on the Police Department's personnel time dedicated to the regulation of the industry. If the City Council adopts the cost recovery fees proposed by the San Diego Police Department, the City will annually recover a \$108 regulatory fee for each holistic health practitioner. The City would also recover a \$338 regulatory fee for each holistic health practitioner business that hires or contracts with other holistic health practitioners or massage therapists. The holistic health practitioner business fee was miscalculated and posted as \$334 in prior public notices. A public notice of the correction was posted in the Daily Transcript and the Public Record Reporter. Notification of the correction was also sent to those individuals and industry representatives on our mailing list. The estimated expense is \$125,218 and the estimated revenue is \$125,230 for 100% cost recovery. The San Diego Police Department proposes that the fees for massage therapists (including massage trainees), massage

establishments, and off-premise massage remain at their current levels. The implementation of the Massage and Holistic Health Ordinances will necessitate the allocation of one additional POII Detective and one quarter of a Public Information Clerk for the Vice Unit, which will be paid for by increased fees. There are no additional costs or fees associated with the general divisions of the proposed ordinances.

BACKGROUND

In November, 1992, a Vice and Licensing Task Force was formed as a joint venture between the City Attorney's Office and the San Diego Police Department. The Task Force was asked to conduct a comprehensive review of laws and local ordinances relating to police regulated businesses. They studied and made recommendations regarding the following industries: massage and holistic health; dance, cabaret, after-hours, and promoters; peepshows; nude entertainment; and escorts. The Task Force recommended amending the divisions in Chapter III, Article 3 of the San Diego Municipal Code pertaining to these industries, as well as amending the General Divisions governing all police-regulated businesses. The recommendations were previously presented to the Public Safety and Neighborhood Services Committee in 1995 and 1996. The ordinance project continued over the years but met with a number of unforeseen delays along the way.

In early 1999, the Task Force project was revitalized by the Vice Unit. Research was done on each ordinance to ensure the recommended changes were appropriate based on current industry environments. Vice investigators conducted inspections and gathered information about changes that have occurred in the industry since the Task Force recommendations were made in 1996. Industry trends and enforcement changes were minor in most industries.

On April 19, 2000, the Committee on Public Safety & Neighborhood Services again heard the recommendations for the massage and holistic health industries and approved them with some modifications for presentation to full Council. The Committee also reheard the recommendations for the General Divisions.

DISCUSSION

The massage industry is regulated under Chapter III, Article 3, Division 35 of the San Diego Municipal Code. The Massage Ordinance was written in 1976 to address widespread prostitution occurring inside massage parlors. It required a massage technician to have a minimum of one hundred hours of massage training and to have passed both practical and written exams prior to licensing.

The first amendments to the ordinance occurred in 1979. These amendments closed a loophole that allowed an individual whose massage technician license was revoked to apply for a new license; prohibited the massaging of a person's genital area; established minimum operating criteria for a massage business and set conduct and dress code standards for the employees; established minimum operating requirements for off-premise massage businesses; and defined specified anatomical areas that had to be clothed. Also, in 1979, the City of San Diego Zoning Department enacted an ordinance that classified Massage Establishments as Adult Entertainment under Chapter 10, Division 18 of the San Diego Municipal Code. This classification required one thousand feet of distance between an adult entertainment establishment and other adult entertainment establishments, any residential zone, any church, school, public park or social welfare institution.

Since 1976, the Police Department has used extensive resources to address prostitution in the massage industry. Some massage parlors involved in prostitution were closed through criminal prosecution although officers expressed concerns over the lack of criminal prosecution arising in the massage setting. Vice officers prefer criminal sanctions over administrative sanctions; however, because of the lack of jury appeal many investigations focus on municipal code violations. Administrative remedies are sought through the revocation or suspension of the police permit.

In 1985, the massage ordinance was amended to exempt holistic health practitioners from police regulation. This exemption was created in recognition of the specialized training and extensive educational background holistic health practitioners possess. Holistic health practitioners were defined in the San Diego Municipal Code as practitioners who used a specialized therapeutic approach to massage, who had completed one thousand hours of instruction from a qualified school, and who were members in a state or nationally chartered organization devoted to massage. Initially, the holistic health practitioners did not hire or subcontract work or rent rooms to massage technicians. The original intent of the exemption was to exempt individuals, not businesses. Then holistic health practitioners began to hire massage technicians as employees or independent contractors. In 1988, the San Diego Municipal Code was amended to allow massage technicians to work under the control and direction of a holistic health practitioner if the technician complied with all operating requirements contained in Division 35.

Unfortunately, the creation of the holistic health practitioner exemption created a loophole for those who wanted to use the massage industry for illegitimate purposes, principally prostitution. Holistic health practitioners are not regulated by state or local laws. Unlike the massage arena where administrative sanctions can be sought, the only way to deal with illegal or unprofessional activity in the holistic health industry is through criminal prosecution. However, because holistic health practitioners are not licensed, even a criminal conviction does not affect their ability to engage in the massage business. Officers are very concerned about holistic health practitioners who are able to obtain the exemption despite criminal convictions for prostitution or related offenses. Such convictions would prevent them from operating as a massage technician, but do not prevent them from operating as a holistic health practitioner.

For example, a holistic health practitioner was arrested for operating three houses of prostitution. Since no administrative action could be taken against the practitioner, the practitioner pled guilty to a misdemeanor and re-opened the establishments shortly after being arrested. In another case, a police licensed massage establishment was shut down after a long history of prostitution activity. The owner re-opened the business by hiring a holistic health practitioner. Shortly after it re-opened, another massage technician was arrested there for prostitution. No action could be taken against the holistic health practitioner or the business because they were exempt from the massage establishment regulations. If the massage technicians violate the law inside the holistic health practitioner's establishment, there is no way to hold the holistic health practitioner accountable.

Complaints to the Police Department from the massage industry also indicate that several holistic health practitioners obtained membership in state or nationally chartered organizations devoted to the specialty of massage merely to comply with the requirement needed to gain their exemption. Once exempted from the massage ordinance, they either withdraw their membership or let it

expire. Due to their exempt status, the Police Department could not require holistic health practitioners to renew their memberships.

Some in the holistic health industry are very sensitive and resistant to any ordinance that compels them to be regulated by the Police Department. They view the problems of illegal and unprofessional activity as mostly confined to the massage industry. The Police Department recognizes that a great majority of the practitioners devote considerable time and money to educate themselves in the field of massage and non-medical health care; however, a recent random investigation of holistic health establishments found there is still a significant element using the loopholes in the current ordinance to engage in unprofessional and illegal conduct. Some holistic health practitioners are hopeful of promoting state regulation but so far such legislation has not been attractive to state lawmakers. Others hope this ordinance will be the model for such legislation.

The Police Department considers the creation of a new division of the San Diego Municipal Code to regulate holistic health practitioners the most effective method for reducing the growth of prostitution in the industry through the use of entry standards and administrative remedies. The proposed ordinance is designed to promote public confidence in the holistic health practitioner industry and enhance their professional image. The recommendations will prevent the entry of less qualified individuals into the holistic health profession. Qualifications will include passing certification exams, continuing education and no related criminal history. Holistic health practitioners will not be regulated by the more stringent massage ordinance requirements.

Many legitimate massage technicians have complained that the massage technician qualifications including the practical and written tests given by the Health Department should be made more difficult to prevent unqualified persons from obtaining police permits. They have also expressed concern that their image is negatively affected by the yellow page advertisements of non-legitimate massage services and escort services. The proposed massage ordinance amendments address these issues by eliminating the Health Department tests, raising the minimum educational standards, and requiring the police permit number to be included in advertisements.

The recommended changes to the massage ordinance will enhance the image of the massage therapist by discouraging individuals interested in using the massage profession for prostitution. The increase in educational requirements will be contemporary with national standards and will protect the public from untrained or poorly trained therapists. The modified operating hours will correspond to the hours of hotels, health clubs and other similar businesses that employ massage therapists.

The recommended changes to the general divisions will make the licensing, renewal and appeal process less cumbersome and fiscally self-sufficient. The changes present legally sound ordinances, provide effective criminal and administrative sanctions for violations of local ordinances, and bring the application and appeal process up to current constitutional requirements.

The proposed ordinances contain the modifications from the Public Safety & Neighborhood Services Committee. The following are the highlights of the proposed ordinances:

MASSAGE RECOMMENDATIONS

- Increase the educational requirements for a police permit to be contemporary with national standards. The requirements will include increasing the minimum number of training hours from 100 hours to 500 hundred hours and requiring 12 hours of continuing education.
- Require that all advertising include the police permit number.
- Modify the operating hours (no operating between the hours of 12:00 a.m. and 6:00 a.m.) in order to be consistent with the business hours of health clubs, hotels, and other businesses that offer massage services.

HOLISTIC HEALTH PRACTITIONERS RECOMMENDATIONS

- Create a new division to regulate holistic health practitioners. Qualifications will include passing the national certification exam, continuing education and no related criminal history.

VICE AND LICENSING OPERATIONS

- Make the application process more efficient by creating a renewal system for fee payments.
- Make the appeal process more efficient by adding a system of fines to existing penalties.
- Modify the application and appeal process in order to be consistent with current constitutional requirements.
- Make the Public Safety and Neighborhood Services Committee the final administrative remedy.

It is also proposed that the massage and holistic health practitioner ordinances become effective on July 1, 2001, in order to allow the local schools time to create programs to match the training requirements.

ADDITIONAL INDUSTRY PROPOSALS

After the April 19, 2000 Public Safety & Neighborhood Services Committee hearing, the Police Department and City Attorney continued to meet with industry representatives, at their request, to ensure all of their concerns and/or suggestions were taken into consideration. Industry representatives suggested additional amendments to the ordinance that are more restrictive than those proposed. Industry representatives state that these amendments would elevate the proposed massage ordinance to the equivalent of the minimum licensing requirements of the twenty-nine states that currently license the massage industry. These industry representatives also suggest that their recommended amendments would set a higher professional standard for the holistic health practitioner. The Police Department is not opposed to the industry's recently suggested amendments and would support the recommended changes if the Council wishes to include them. The industry's additional suggested amendments are as follows:

MASSAGE:

- Require passage of the approved national exams for massage therapists.
- Require all current massage therapists to pass approved national exams within three years.
- Require massage therapists to show proof of current National Certification Board for Therapeutic Massage and Bodywork (NCTMB) certification at time of police permit renewal in order to ensure their national certification remains current after receiving their initial permit.
- Add false or deceptive advertising or advertising hours other than allowed as grounds for suspension or revocation of a permit.
- Require two hundred hour trainee applicants to pass the County Health Department written and practical exams.

HOLISTIC HEALTH PRACTITIONER:

- Require all current holistic health practitioners to pass the approved national exams within three years.
- Require holistic health practitioners to show proof of current NCTMB certification at time of renewal to ensure their national certification remains current after receiving their initial permit.
- Add false or deceptive advertising as a reason for suspension or revocation of a permit.

Some industry members have proposed retention of the current exempt status of the holistic health practitioner, with the additional requirement that the holistic health practitioner have no related criminal history. They propose that the exemption could be “revoked” for criminal activity. However, the City Attorney advises that “revoking” an exemption would not prevent the person from being a holistic health practitioner. The City Attorney and San Diego Police Department do not support this proposal because it lacks the appropriate appeal process to make it legally sound, would not prevent a convicted prostitute from engaging in prostitution, and lacks requiring other qualifications for the holistic health practitioner. In order to design a system that would prevent the person from being a practitioner, the system would, in essence, be a permit system, with the necessary appeal process.

Because the proposed ordinances have already been heard by the Public Safety & Neighborhood Services Committee, any further amendments at this stage need to be made at the direction of the Council.

ALTERNATIVES

Approve selected recommendations.

Approve none of the recommendations.

Respectfully submitted,

David Bejarano
Chief of Police

Approved: Michael T. Uberuaga
City Manager

BEJARANO/LD

- ATTACHMENTS:
1. City Managers Report No. 00-53
 2. Draft and Strikeout Ordinance, 0-2001-3, Division 35 – Massage, on file at the City Clerk’s office.
 3. Draft and Strikeout Ordinance, 0-2001-2 Division 1-5 Police Regulated Businesses and Occupations, on file at the City Clerk’s office.
 4. Draft and Strikeout Ordinance, 0-2001-5, Division 44-Holistic Health, on file at the City Clerk’s office.
 5. Proposed Fee Structure
 6. Vice and Licensing Task Force Report, June 1996.
 7. Luth Report.
 8. Compilation of land-use studies related to Adult Entertainment, on file at the City Clerk’s office.